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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 772

SAMSON EISNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The opinion of the Court of Appeals for the Sixth Circuit was delivered January 10, 1962, in case styled *United States of America, Plaintiff-Appellee v. Samson Eisner, Defendant-Appellant*, and numbered 14,621. A copy of said opinion is contained in the record as printed for the use of the court below and filed herewith (R. 194a-197a).

STATEMENT OF JURISDICTIONAL GROUNDS

Samson Eisner prays that a writ of certiorari issue to review an important question of Federal Law decided by

the United States Court of Appeals for the Sixth Circuit in conflict with applicable decisions of this court; to review the question of the search and seizure involved herein which contravened the Fourth Amendment of the Constitution of the United States, and to review the question of the use of the items seized in evidence which vitiated petitioner's conviction in that such use was in contravention of the Fifth Amendment of the Constitution of the United States. The judgment sought to be reviewed is dated and was entered on January 10, 1962 (R. 193a). The Honorable Potter Stewart, Associate Justice of this court, on February 9, 1962, granted an extension of time within which to petition for certiorari herein, to and including March 6, 1962 (Appendix . .). Section 1254 (1), Title 28, United States Code, confers jurisdiction on this court to review the judgment in question by writ of certiorari. The defendant was charged with a violation of Section 2315, Title 18, United States Code, which conferred jurisdiction on the trial court.

QUESTIONS PRESENTED

The questions presented are:

1. Did the affidavit for the search warrant involved herein contain sufficient facts to justify the United States Commissioner's finding that probable cause existed that a law of the United States was being violated?

2. Could property not described in the search warrant be seized and used in evidence?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The petitioner was indicted for a violation of Section 2315, Title 18, United States Code. The material portion thereof, in words and figures, is as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities or money of the value of $5,000.00 or more . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken;
>
> "Shall be fined not more than $10,000.00 or imprisoned not more than ten years or both."

The full text of said statute is set forth in the Appendix hereof at Page . . .

The Fourth Amendment of the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamouse crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 41 of the Criminal Procedure for the United States District Courts is set forth in the Appendix hereto at Page . . . .

STATEMENT OF CASE

The petitioner was arrested for a violation of Section 2315, Title 18, of the United States Code, by a special agent of the Federal Bureau of Investigation, in Bowling Green, Kentucky, on September 7, 1960, after his automobile was searched pursuant to a search warrant issued by the United States Commissioner at Bowling Green, Kentucky. There was seized, as a result of the search, certain fur pieces which had been stolen from the Wermuth Fur Company, Sioux Falls, South Dakota, on August 29, 1960. On the day of the arrest, or the day before, the Federal Bureau of Investigation received information from an undisclosed confidential source that petitioner was registered at the Gateway Motel, in Covington, Kentucky, some 224 miles northeast of Bowling Green, Kentucky, and that he had in his possession certain fur pieces stolen from the Davidson Indiana Fur Company, Indianapolis, Indiana (R. 117a-118a). The Federal Bureau of Investigation, on the morning of the arrest, put the petitioner under surveillance and, when he departed the motel in his automobile, he was followed by agents of the Federal Bureau of Investigation to Bowling Green, Kentucky. Kentucky State Police and the City Police of Bowling Green, Kentucky, were notified of petitioner's destination, possible route and that they should be on the alert to arrest petitioner if he violated any state or local laws. These state and local police officers were also instructed by the Federal Bureau of Investigation to inform them if they apprehended petitioner and discovered any stolen merchandise in his possession (R. 115a-116a). At Bowling Green, Kentucky, a City Detective, accompanied by a special agent of the Federal Bureau of Investigation, stopped petitioner in his automobile, at or about 2:30 o'clock P. M. (R. 83a), and took him to the local police station, where he remained until approximately 4:20 o'clock P. M. (R. 111a). Peti-

tioner was then taken before the United States Commissioner in Bowling Green, Kentucky, where he was held until approximately 5:56 o'clock P. M. (R. 125a), at which time he was taken to his automobile, where a search warrant, previously issued by the Commissioner, was executed by the agent by searching petitioner's automobile. The aforementioned Wermuth fur pieces were seized. No Davidson's fur pieces were found (R. 118a-119a). At the time of the search and seizure, the agent who executed the affidavit for the search warrant and who conducted the search, had no knowledge that the Wermuth fur pieces had been stolen (R. 118a).

The affidavit for the search warrant (R. 16a), signed by Special Agent Mark Wallace, a resident agent of the Federal Bureau of Investigation stationed at Bowling Green, Kentucky, upon which the United States Commissioner found sufficient probable cause to exist to justify the issuance of the search warrant, is in words and figures as follows:

> "That he (has reason to believe) that (on the premises known as) one 1960 Oldsmobile Convertible Automobile, Ohio License Registration for 1960 7942GG, Ser. No. 609 M 16689, in the Western District of Kentucky, there is now being concealed certain property, namely stolen merchandise, to-wit: Furs which are a part of the loot taken in a break-in at the Davidson Fur Company Inc., Glendal Center, Indianapolis, Ind. and which are believed to be in the automobile described above which are Title 18, Section 2315.
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: S. A. John McCardle, FBI, Indianapolis, Ind., has information that a break in and theft occurred at Davidson Indiana Fur Co., Glendal Center, Indianapolis, Ind., on Sept. 4, 1960, in the course of which fur garments of the approximate value of $120,000.00 were taken. I have received information

through official channels from Agt. John McCardle about this breakin. Information has been obtained by S. A. Clifford Anderson, FBI, Cincinnati, Ohio which he believes to be reliable to the effect that Sam Eisner received furs which were a part of the loot from the Davidson Indiana Fur Co.; in Ky., after they had been transported from Indianapolis, and had knowledge that they had been stolen."

Subsequently, the petitioner was indicted by a United States Grand Jury for the Western District of Kentucky, convened at Louisville, Kentucky, in a one count indictment for a violation of Section 2315, Title 18, United States Code (R. 12a-13a).

Prior to the trial on this indictment, the petitioner filed a Petition to Suppress Evidence, with exhibits (R. 14a-18a), and affidavit of petitioner in support thereof (R. 18a-21a). *No response nor counter-affidavit was filed by the government and no parol evidence was offered upon the Petition to Suppress.* The District Court had before it *only* the affidavit of Special Agent Mark Wallace, upon which the search warrant was issued, the Petition to Suppress and petitioner's affidavit in support thereof. The Court then heard arguments of counsel and denied the Petition to Suppress (R. 22a-23a).

The Wermuth fur pieces seized were introduced at the trial over the objections of petitioner. The petitioner was convicted, sentenced to 5 years and fined $1,500.00 (R. 186a).

Upon appeal to the Court of Appeals for the Sixth Circuit, the judgment of the District Court was affirmed (R. 193a).

ARGUMENT

The questions here involved were decided by the United States Court of Appeals for the Sixth Circuit in conflict with applicable decisions of this court; the search and

seizure involved herein contravened the Fourth Amendment of the Constitution of the United States and therefore, the use of the items seized in evidence vitiated petitioner's conviction in that such use was in contravention of the Fifth Amendment of the Constitution of the United States.

The issues are very narrow in scope and were so narrowed by the Trial Court and the Appellate Court.

I

The Trial Court, in denying the Petition to Suppress (R. 35a) said:

> "I don't think there is any doubt about it being a valid search. . . . I must conclude that it is a valid search warrant, *based on information which is set forth in the affidavit of the agent on which we have to rely.*" (Emphasis added.)

The Court of Appeals, in its opinion (R. 194a-195a) said:

> "With respect to the issuance of the warrant, we are of the opinion that the affidavit stated facts from which the Commissioner could find probable cause for believing that the laws of the United States were being violated. (Rule and case cited.)
>
> "Nor was the affidavit insufficient because the statement of facts therein was based on hearsay instead of on the affiant's personal observation and knowledge. (Cases cited.) *In our opinion, a substantial basis for crediting the hearsay was presented.*" (Emphasis added.)

The affidavit of Special Agent Mark Wallace, to which both courts are referring, contains *only* hearsay and *no* basis for crediting the hearsay. Additionally, the hearsay, insofar as it relates to Special Agent Wallace, the agent making the oath, is at least third handed. In his affidavit, he said (R. 16a):

> "S. A. John McCardle, FBI, Indianapolis, Ind., has information that a break in and theft occurred at Davidson Indiana Fur Co. . . . I have received information through official channels from Agt. John McCardle about this breakin."

and

> "Information has been obtained by S. A. Clifford Anderson, FBI, Cincinnati, Ohio . . . to the effect that Sam Eisner received furs . . . from the Davidson Indiana Fur Co., in Ky., . . ."

In his testimony, Special Agent Wallace said he received this last quoted information from his Louisville office and that he never talked to Special Agent Anderson of Cincinnati (R. 117a).

The only attempt to "credit" the hearsay of the informant in the affidavit was the statement (R. 16a):

> ". . . which he (S. A. Anderson), believes to be reliable. . . ."

Rule 41 of the Rules of Criminal Procedure states (Appendix):

> "A warrant shall issue only on affidavit sworn to before the judge or commissioner and *establishing the grounds* for issuing the warrant." (Emphasis added.)

The Fourth Amendment of the Constitution of the United States provides that:

> ". . . no Warrants shall issue, but upon probable cause, *supported by Oath* or affirmation. . . ." (Emphasis added.)

The affidavit for the search warrant is insufficient to establish probable cause for it merely states affiant's belief that there is a cause to search, without stating facts upon which that belief is based. See *Nathanson* v. *United*

States, 290 U. S. 41. This is also true of an affidavit which contains only hearsay. However, an affidavit containing *solely* information received from an informant, must also state, upon the officer's oath, *that the informant had previously given accurate information, that the informant's story was corroborated and that the accused was known, by the officer, to have a propensity for committing the type of violation of which he was then suspected.* See *Jones* v. *United States*, 362 U. S. 257. The Court of Appeals for the Sixth Circuit cited the *Jones* case, supra, in their opinion (R. 195a) and stated:

> "In our opinion, a substantial basis for crediting the hearsay was presented."

We ask, where was it presented? That quote from *Jones* v. *United States*, supra, was taken out of context from this court's opinion. A thorough reading of that opinion indicates without a doubt, that the "crediting" testimony must be contained in the affidavit submitted to the Commissioner prior to the issuance of the search warrant. See also *Steele* v. *United States*, No. 1, 267 U. S. 498, 501, wherein this court said:

> "The judge or commissioner must before issuing the warrant examine on oath the complainant and any witness he may produce, and require their affidavits or take the depositions in writing and cause them to be subscribed by the parties making them. *The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.*"

The affidavit of Special Agent Mark Wallace, the only evidence submitted of record to the Commissioner, *contains no statement that the officer's informant had previously given accurate information or any previous information, no statement that the informant's story was corroborated*

by other sources of information or otherwise and no statement that the petitioner had a record or reputation for dealing in stolen goods. In fact, there was no statement in the affidavit that he had ever been involved in any type of law violation.

In *Jones* v. *United States*, supra, this court said:

> "Thus we may assume that Didone had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;*" (Emphasis added.)

That quotation contains the *conclusion* that petitioner there, was selling narcoties, bolstered by the *fact* that the informant had purchased narcotics from the petitioner. Here, however, we have only *the conclusion* of an informant that petitioner had received certain stolen furs, with *no facts* upon which to base the conclusion. Additionally, here there was no corroboration of the informant's story. In the *Jones* case, supra, this court continued:

> ". . . but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history."

This court found, in the *Jones* case, supra, that there was substantial basis for the Commissioner to conclude that narcotics were probably present in the apartment and that there was a substantial basis for crediting the hearsay contained in the affidavit. Here, there is *no* substantial

basis for the Commissioner to conclude that petitioner had stolen furs in his automobile in Bowling Green, Kentucky, and no basis for crediting the hearsay complained of.

The *Jones* case, supra, contains clear authority for the Appellate Court below to have reversed the Trial Court for its refusal to sustain petitioner's Petition to Suppress. The affidavit just did not contain *any basis* for crediting the hearsay.

We submit that the search warrant does not contain sufficient to have justified the issuance of the search warrant; that the search and seizure was unlawful and in contravention of the Fourth Amendment of the United States Constitution and Rule 41 of the Rules of Criminal Procedure; that petitioner's rights, protected by the Fourth and Fifth Amendments of the Constitution of the United States, were violated; that the Court of Appeals for the Sixth Circuit decided the case below in conflict with this court's decision in *Jones* v. *United States*, supra, and other applicable decisions.

II

The Fourth Amendment to the Constitution of the United States stands as the citizen's guarantee that he shall be secure in person and property against unreasonable search and seizure. In *Weeks* v. *United States*, 232 U. S. 383, this court held that evidence obtained through an illegal search and seizure was inadmissible in a federal prosecution. The petitioner brought in issue in the Trial Court before trial, the circumstances surrounding the search and seizure by filing his Petition to Suppress the evidence. *Segurola* v. *United States*, 275 U. S. 106; *Gouled* v. *United States*, 255 U. S. 298; Rule 41 F. R. Crim. P.

Closely allied with the right to protection from an unlawful search and seizure, propounded by the Fourth Amendment to the Constitution of the United States, is the right

to refuse to give incriminating evidence against one's self, guaranteed by the Fifth Amendment of the Constitution of the United States. Here, the petitioner objected to the introduction of the property seized at the time it was offered in evidence at the trial and if it was seized illegally, it should not have been introduced as evidence against him.

III

The second question presented by petitioner involves the right of the federal agent to seize property not described in the search warrant and the right of the government to introduce this property in evidence over the objection of petitioner (R. 81a).

The property is described in the search warrant as (R. 17a):

> ". . . furs which are a part of the loot taken in a breakin at the Davidson Fur Company, Inc., Glendal Center, Indianapolis, Indiana. . . ."

No other description was included in the search warrant. There was no Davidson furs seized from petitioner. The following question was propounded to and answered by Special Agent Wallace (R. 118a):

> "Q. Well, as it developed when you searched the automobile, you didn't find any furs from the Davidson Indiana Fur Company, did you? A. As it developed, that is correct."

All of the furs found in petitioner's automobile, with the exception of two, had tags containing the words "Wermuth Furs" and a description of the fur piece with numbers and a dollar figure (R. 19a). The two untagged pieces and all of the tagged pieces were identified by Mr. Lennen, part owner of Wermuth Fur Company, as Wermuth Furs. It is undisputed that the furs described in the search warrant

were "Davidson furs" and that the furs seized were "Wermuth furs."

The Appellate Court below dismissed this question on appeal with these words in its opinion (R. 196a).

> "Disregarding for the moment what was taken in the search, we are of the opinion that although the affidavit upon which the search warrant was issued referred to furs stolen from the Davidson Indiana Fur Company of Indianapolis, Indiana, and such furs were not found in the automobile, this fact did not invalidate the search warrant or the search."

That court quoted a portion of Rule 41 (e), Rules of Criminal Procedure, and *Marron v. United States*, 275 U. S. 192. With both quotations we agree. This is the law as enunciated by this court. The Court of Appeals below, in its opinion (R. 196a), said:

> "*Rule 41 (e) Rules of Criminal Procedure*, provides for the return of the property seized to the party aggrieved and to suppress its use as evidence on the ground that 'the property seized is not that described in the warrant.' In *Marron* v. *United States*, 275 U. S. 192, at p. 196, the Supreme Court said, '*The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*' See: *Steele* v. *United States*, No. 1, 267 U. S. 498, 501." (Emphasis added.)

In *Steele* v. *United States*, supra, this court said:

> "If it appears that the property taken is not the same as that described in the warrant, . . ., the judge or commissioner must cause the property to be restored to the person from whom it was taken;"

The Appellate Court below then went on in its opinion, calling attention to an apparent exception [illegible]

rule recognized by this court in cases where the officer, during a valid search, discovers that another crime is being committed. It cited *Harris* v. *United States*, 331 U. S. 145, which held that an agent making a valid search may seize property found on the premises which is the subject matter of a different crime. In the *Harris* case, supra, the things seized were Notice of Classification cards and registration certificates which were the property of the United States and unlawfully in possession of Harris. Here, the property seized was not the property of the United States Government, but fur pieces owned by a private company. According to the record, Special Agent Wallace did not, at the time of the search and seizure, know the Wermuth furs seized to be "the subject matter of a different crime." He did not know, at that time, that the Wermuth furs, or anything else, had been stolen from the Wermuth Fur Company. Even at the time the Trial Court below overruled petitioner's Petition to Suppress this evidence, it had before it no evidence that the Wermuth furs were stolen furs or even that the Davidson furs had been stolen. At that time, all the Trial Court had before it were the search warrant, affidavit for the search warrant, petitioner's Petition to Suppress and his affidavit in support thereof. This is undisputed. Could the Trial Court conclude, from that evidence, that the property seized was in fact "the subject matter of a different crime" or of any crime?

The Appellate Court below cited only two other decisions of this court to support its opinion in this respect, *Davis* v. *United States*, 328 U. S. 582, 592-593, and *Zap* v. *United States*, 328 U. S. 624, 629.

In the *Davis* case, supra, the property seized was public property. At page 589, this court said:

> "We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen."

The *Zap* case, supra, involved the seizure of a check from a person doing work under a government cost-plus contract, under which the petitioner there agreed to permit inspection of his accounts and records.

Neither of those cases can be construed to be authority for the opinion of the Appellate Court below. Accordingly, the property seized, not being the property described in the search warrant and the Trial Court having no knowledge that the property seized was stolen property, at the time it ruled on petitioner's Petition to Suppress, should have been suppressed as evidence at the petitioner's trial.

CONCLUSION

Petitioner has raised herein important questions in the administration of criminal justice in the United States Courts and for the reasons set out in this petition, petitioner respectfully prays that certiorari be granted.

Respectfully submitted,

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 6, 1962.

/s POTTER STEWART,
Associate Justice of the Supreme Court of the United States.

Dated this 9th
day of February, 1962.

Section 2315, Title 18, United States Code.

2315. Sale or receipt of stolen goods, securities, or monies.——

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever received, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever received in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used-

in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof——

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. (June 25, 1948, c. 645, § 1, 62 Stat. 806.)"

Rule 41, Criminal Procedure, United States District Court.

Rule 41. Search and Seizure.—(a) Authority to issue warrant.——

A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for issuance.——

A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957 (18 § 957).

(c) Issuance and contents.——

A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and return with inventory.——

The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other

than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for return of property and to suppress evidence.——

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

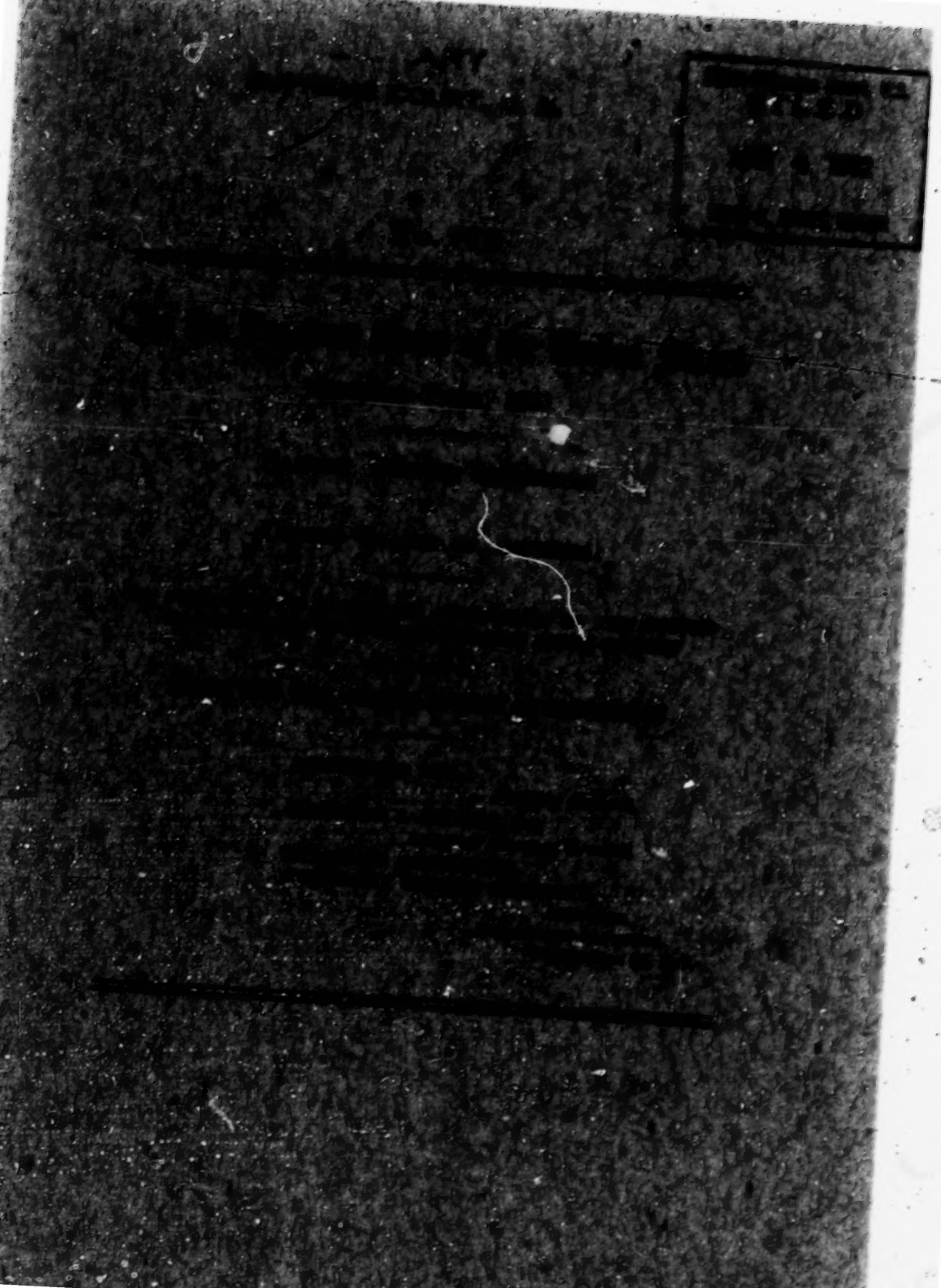
(f) Return of papers to clerk.——

The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection

therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and definition.

This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. (As amended Dec. 27, 1948.)



In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 772

SAMSON EISNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 194–197) is reported at 297 F. 2d 595.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1962 (R. 193). On February 9, 1962, Mr. Justice Stewart entered an order extending the time for filing a petition for a writ of certiorari to and including March 6, 1962 (Pet. App. 1a). The petition was filed on March 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the search warrant was issued on probable cause.

2. Whether the seizure of stolen furs under a search warrant was valid where it subsequently developed that the furs were stolen from a source other than that described in the warrant.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Kentucky on a one-count indictment which charged the receipt and concealment of furs stolen in South Dakota and transported interstate in violation of 18 U.S.C. 2315 (R. 12–13, 185). He was sentenced to imprisonment for five years and fined $1,500 (R. 25–26, 186). The court of appeals unanimously affirmed the conviction (R. 194–197).

The issues raised relate to the validity of the seizure of the stolen furs, valued at $7,700 (R. 55). On this issue the facts may be summarized as follows:

Through official F.B.I. channels, an F.B.I. agent in Bowling Green, Kentucky, was informed that furs had been stolen from the Davidson Indiana Fur Company in Indianapolis on September 4, 1960, and that an agent of the Cincinnati office had information, which he believed to be reliable, that petitioner had received part of the furs after they had been transported from Indianapolis (R. 16, 117–118). On September 7, 1960, F.B.I. agents in Covington, Kentucky, set up a surveillance of petitioner, who was driving a 1960 white convertible Oldsmobile with a blue top (R. 62–63). Petitioner was followed part of the way to Bowling Green and then lost (R. 69–71). At

2:30 an F.B.I. agent in Bowling Green informed the city detective that petitioner's car was headed that way at an excessive rate of speed and was probably carrying "stolen merchandise," and that if the detective should have occasion to arrest the driver, the agent would like to know what could be observed in the car (R. 77–78, 115–116). The agent did not inform the detective that the stolen items were furs (R. 113–114). The agent and detective discovered petitioner as he was coming into town, and when he failed to stop for a stop sign, the city detective arrested him (R. 106–107, 78–79).[1]

Thereafter the city detective asked petitioner if he could look in the back of the car, telling him that they were "having trouble with people out of state hauling whiskey into Bowling Green" (R. 79), which was then dry (R. 85). Petitioner opened the trunk and assisted the city detective in looking through the paper sacks and a duffel bag (R. 79–80, 127). A light gray fur was sticking out of one of the sacks. Petitioned volunteered, "They are my wife's furs" (R. 80). The agent, who remained in the F.B.I. car, also saw the sacks and duffel bag and a piece of fur protruding from one (R. 107–108).

Petitioner was brought to the city hall at 3:10 (R. 108) and the judge was called (R. 87). At 4:05 the F.B.I. agent told petitioner that he was under arrest for the federal offense of receipt and concealment of stolen furs and advised him of his rights

[1] On cross-examination the city detective testified (R. 96): "If he hadn't run a stop sign, we would never have stopped him."

(R. 108–109).[2] The agent asked for permission to search the trunk. Petitioner threw the keys to the city detective and said, "Well, you have already searched it. Go ahead. I don't care what you do" (R. 101–102, 109). Since the F.B.I. agent did not regard this as clear consent, no search was made (R. 109). Petitioner called an attorney (R. 111), who appeared in the office of the United States Commissioner at 4:25 and was advised of the charges (R. 111).

The agent applied to the Commissioner for a search warrant to search the car (R. 112). There were two affidavits filed for the search warrant. One signed by the F.B.I. agent described the car to be searched and stated that he believed it contained "stolen merchandise, to-wit: Furs which are a part of the loot taken in a break-in at the Davidson Fur Company, Inc." The affidavit also described the sources of information as the official report of the Davidson robbery and the "tip" to the Cincinnati agent from a source believed to be reliable that petitioner had received the furs. The other affidavit signed by the city detective stated that he had arrested petitioner in the described automobile and that, with petitioner's consent, he had observed a quantity of furs in the trunk (R. 16–17).

A warrant was issued for the search of the car for property described as "stolen merchandise, to-wit:

[2] The F.B.I. agent did not talk to petitioner until the time that he arrested him. Meanwhile, he had contacted the Louisville office of the F.B.I. which in turn had discussed the situation with a government attorney (R. 124).

furs which are a part of the loot taken in a break-in at the Davidson Fur Company, Inc." (R. 17). In petitioner's presence the trunk of the car was opened and the four sacks of furs were removed and inventoried (R. 112–113, 125–126). When the agent asked petitioner where the furs came from petitioner replied, "I don't know where they came from. They are not mine. You must have put them in there. You have had the keys long enough" (R. 113). At the trial, petitioner claimed he had purchased the furs (R. 134–139).

Later that night, Mr. Davidson of the Davidson Fur Company inspected the furs and said they were not part of the furs stolen from his company. The agent then took steps to discover their source and ownership (R. 118). It developed that the furs had been stolen on August 29 or 30 from the Wermuth Fur Company of South Dakota (R. 53–59).

On a motion before trial to suppress the evidence seized under the warrant, the court held that the affidavits for the search warrant constituted probable cause and the warrant was validly issued (R. 35–36).

ARGUMENT

1. Petitioner attacks (Pet. 7–12) the sufficiency of the affidavits supporting the search warrant to state probable cause for the search, on the ground that they were based solely on hearsay. His argument ignores the affidavit of the city detective (R. 16–17), which was not hearsay, but reported that he had seen furs in the car petitioner was driving. Taken together, the affidavits showed official notice of the theft of

furs, information believed to be reliable that petitioner received the furs, corroborated by the fact that petitioner was in fact carrying furs. As the courts below held, this was sufficient probable cause for the issuance of a warrant for the search of the automobile. See *Jones* v. *United States*, 362 U.S. 257, 269; *Draper* v. *United States*, 358 U.S. 307.[3]

2. The fact that the furs, reasonably believed to be those stolen from the Davidson company turned out to have been stolen from another company, does not invalidate the search or seizure. While some, although not all, of the furs were labelled Wermuth Furs, the agent still could reasonably believe that the furs were those described in the warrant. Different labels on the furs some days after the robbery would not suggest to the agent that the furs were other than those described in the warrant; a change of labels would be a likely method of concealing the fact that furs had been stolen.

A search or seizure not based on probable cause does not become valid because contraband is in fact discovered. This Court said in *United State* v. *Di Re*, 332 U.S. 581, 595, that a search "is good or bad when it starts and does not change character from its success." A corollary to this is that a search based on probable cause does not become invalid because the

[3] Petitioner has italicized the statement that "no parol evidence" or response was submitted on the motion to suppress (Pet. 6). Testimony is not essential, however, when the attack is upon a search warrant based upon affidavits. In fact, petitioner's trial counsel asserted "* * * I doubt very much if it would be necessary to take any testimony about this" (R. 32). See *Jones* v. *United States*, *supra*, 362 U.S. at 267.

items seized were not the contraband they were reasonably thought to be. Thus, this Court has held that, if a search is valid and made in good faith, the officers need not ignore material related to other crimes than that which is the basis for the search. *Harris* v. *United States*, 331 U.S. 145, 154–155; *Abel* v. *United States*, 362 U.S. 217, 238. This principle particularly applies when the officers did not know that the items seized related to a different crime at the time of the seizure. Once it was learned, after the seizure had been made, that the furs were in fact stolen, although from a company different from that originally believed to be the source, there was of course no necessity to return them to petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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